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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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MEMORANDUM OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association, with the consent of the parties, submits this memorandum *amicus curiae* in support of the petition for a writ of certiorari.

INTEREST OF THE AMERICAN BAR ASSOCIATION

The petition for a writ of certiorari raises two issues of peculiar significance to lawyers: (1) the scope of the attorney-client privilege as applied to communications made to a lawyer by the officers and employees of a corporate client; and (2) the extent to which a lawyer's work product on behalf of a client may be subject to administrative discovery. Issues of confiden-

tiality such as these go to the heart of the relationship between lawyer and client, and they bear importantly upon the lawyer's role in the administration of justice. Continued uncertainty with respect to these issues will impede the efforts of lawyers to provide responsible, effective representation and to give the informed guidance necessary to ensure compliance with the law. It therefore is of central concern to the organized bar, and to the legal profession generally, that the questions presented in the petition be given prompt, authoritative resolution and that they be decided with the views, needs, and responsibilities of the profession in mind.

ARGUMENT

1. *The attorney-client privilege, as applied to corporate clients, should not be restricted solely to communications made by members of the corporation's control group.* The court of appeals in this case held that the attorney-client privilege, as it applies to corporate clients,[1] protects only communications made by those relatively senior corporate executives who decide how the corporation will act in response to the advice of counsel. In so holding, the court emphasized and enlarged a continuing conflict among the circuits. Two other courts of appeals previously had endorsed the "control group" test adopted by the court below. *See In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979); *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).[2] On the other hand, two courts of

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[1] It has long been understood that the attorney-client privilege applies to corporate clients. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). *See also, e.g.*, United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915).

[2] Under the "control group" test, the attorney-client privilege extends only to communications between counsel and corporate officers or employees who have "the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer or is an authorized member of a group that has such power." Natta v. Hogan, 392 F.2d at 692. *See also* City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

appeals have rejected that test, adopting instead a less restrictive view of the attorney-client privilege. *See Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596, 609 (8th Cir. 1978) *(en banc); Harper & Row Publishers, Inc.* v. *Decker,* 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd by an equally divided vote,* 400 U.S. 348 (1971).[3]

The very existence of a conflict, which results in litigants in different circuits being subjected to different rules, is of course sufficient cause for review of this case on certiorari. Sup. Ct. R. 19(1)(b). The conflict represented by this case, moreover, stands in special need of resolution, for corporations with nationwide activities at present are left with no adequate means of determining in advance whether communications that officers and employees make to counsel will be afforded the protection of the attorney-client privilege. Furthermore, as this Court recognized in granting certiorari in *Harper & Row,* correct delineation of the scope of the attorney-client privilege as applied to corporate clients also is a matter of manifest public importance affecting both the legal profession and the administration of justice.

In addition, *amicus* submits that this case was decided incorrectly by the court of appeals. The purpose of the attorney-client privilege "is to encourage clients to make full disclosure to their attorneys." *Fisher* v. *United States,* 425 U.S. 391, 403 (1976). *See also Radiant Burners, Inc.* v. *American Gas Ass'n,* 320 F.2d at 322. Such full disclosure obviously is in the interest of both lawyer and client. The competent attorney cannot render sound legal advice or provide effective representa-

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[3]Under the "subject matter" test adopted in *Harper & Row,* "an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." Harper & Row Publishers, Inc. v. Decker, 423 F.2d at 491-92. The Eighth Circuit in *Diversified Industries* adopted a "modified *Harper & Row* test." Diversified Industries, Inc. v. Meredith, 572 F.2d at 608.

tion unless he has thorough knowledge of all relevant facts, including both the actions his client has taken and the information upon which his client acted. These facts can best, and in most instances only, be learned directly from the client. "If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R.R.*, 236 U.S. at 336. *See also Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458 (1876). Consequently, this Court has long understood that "it is indispensable for the purposes of private justice," *Chirac* v. *Reinecker*, 24 U.S. (11 Wheat.) 280, 294 (1826), that "the apprehension of compelled disclosure by the legal advisers . . . be removed." 8 Wigmore, *Evidence* § 2291 at 545 (McNaughton rev. 1961).

The full disclosure promoted by the attorney-client privilege also serves the larger societal interest of "encourag[ing] adherence to the law." Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L. Rev. 262, 270 (1963). This is especially true with regard to corporate clients. If disclosures may be made in confidence, counsel is better able to investigate allegations of wrongdoing within the corporation, determine the legal implications of past actions, and advise on how to avoid future violations.

The narrow compass given to the attorney-client privilege by the court of appeals below frustrates the privilege's central purpose of encouraging full disclosure to counsel. The "control group" test adopted by the court of appeals directly inhibits disclosure by exposing to discovery the very communications that counsel would find to be of greatest assistance. "In practice, [the "control group" test] results in protecting only communications of top level executives which fails to take into account the realities of corporate life." *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d at 608. A corporation's senior executives rarely will be in the best position to inform counsel concerning specific factual details on which legal issues may turn. First-hand knowledge of the relevant facts usually is possessed by middle-level executives or operating personnel. These are the employees from whom counsel must acquire the

information upon which his advice will be based, yet the "control group" test discourages the corporation from asking them to make a full disclosure.

Moreover, as a practical matter much of corporate counsel's day-to-day legal advice is rendered to employees considerably below the level of senior management. This is so for at least two reasons. First, it is more efficient, and more effective, to give legal advice directly to those whose conduct is to be guided thereby, and that frequently means operating personnel far removed from the boardroom. Second, " 'middle management executives who probably do not qualify for inclusion in the control group . . . have responsibilities for making recommendations which are ratified verbatim by the higher echelon management. . . .' In fact, middle management may include the parties whose statements most need protection because these men frequently are the real decision makers." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360, 373 (1970). To inhibit disclosures by and communications with middle management and operating personnel therefore strikes at the very heart of the relationship between corporate counsel and his client.

The "control group" test operates indirectly as well as directly to inhibit full disclosure of relevant facts to counsel. "From the lawyer's viewpoint, the underlying policy of assuring a client that his communications will remain confidential will be served only if the lawyer is able to predict, with reasonable reliability, that a particular communication will be held by a court to be privileged." *Id.* at 375. But the consequence of the "control group" test is that each time an attorney is asked for advice by a corporate client, he must first inquire into the position, status, and responsibility of the corporate employee making the request in order to determine whether the employee is within the requisite control group. The answer may not always be clear; the employee may have some authority but not necessarily enough.[4] And a determination made when the

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[4] The attorney thus is presented with a practical difficulty at the outset. He may be forced to make an initial investigation into a matter having little or nothing to do with the legal issue with respect to which his advice

request or communication occurs may not withstand the passage of time: since the identity of the group empowered to decide the corporation's course of action depends not only upon the nature but also upon the significance of the matter to be decided, its membership cannot always be known with certainty at the time facts are marshalled and advice given. Thus, counsel may not rely with confidence on the availability of the attorney-client privilege with respect to communications on matters that may possibly grow in significance over time.[5] This uncertainty over the scope of the privilege as applied to particular communications could discourage even disclosures that otherwise might later have been recognized as privileged.

The "control group" test confronts counsel with a painful and unfair dilemma: he must either render advice and provide representation on the basis of inadequate knowledge of the facts or obtain such knowledge at the risk of becoming a discovery tool for opposing parties. The dangers of proceeding without a full understanding of the facts are manifest. The lawyer has an obligation to inquire fully into the corporate actions and other facts that bear upon the advice he has been requested to give. Yet, if the "control group" test applied, the lawyer would need to advise the control group (assuming that it could be identified) of the hazards of making inquiries that would fall outside the protection of the attorney-client privilege. As a consequence, he might be constrained to give advice without the benefit of full and candid responses to such inquiries. Such a procedure obviously is undesirable: it is not in the interest either of the corporation or of society at large for

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is sought. He may, in effect, be required to give two layers of advice, one as to whether the ensuing communications will be privileged and another on the merits of the legal problem at hand. This can and almost certainly often will occur in situations requiring immediate legal advice on the merits.

[5] In contrast, the "subject matter" test adopted in *Harper & Row* "creates a measure of predictability on which attorneys and corporations can rely." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. at 370.

the corporation to be forced to play blindman's bluff with the law.

Furthermore, under the "control group" test the consequences for the lawyer who aggressively presses his inquiries into the facts can be embarrassing in the extreme. His reward for diligence, for example, may be that he later is required to deliver to opposing parties damaging information that causes his client to lose the action he was hired to win. The lawyer may even be called to testify against his client. A practice of that sort would be sadly "demoralizing to the Bar. . . ." *Hickman* v. *Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

There also is an element of unfairness to middle management and operating personnel in the "control group" test. An attorney's investigation may result in communications by employees that reveal possible civil or criminal violations that they may have committed in the course of their employment, and for which they may be individually liable. *See, e.g., United States* v. *Wise*, 370 U.S. 405 (1962). Under the "control group" test, the corporation or its counsel could be compelled to disclose all communications of that nature made by officers and employees other than senior executives; only communications made by members of the control group would be insulated from such compelled disclosure. Thus the "control group" test unfairly puts different employees on a different legal footing with respect to the confidentiality of their admissions to corporate counsel. Moreover, the knowledge that the government could compel the corporation or its counsel to disclose their potentially incriminating communications almost certainly would dissuade lower-level employees who have information of questionable activities from revealing such information to counsel. As a consequence, the "control group" test could directly frustrate the corporation's efforts to discover the facts and acquire the information that it needs in order to put an end to any unlawful activities and place itself in full compliance with the law.

The court of appeals below apparently believed that the restrictive "control group" test was a necessary means of facilitating discovery by opposing parties. But the denial of

confidentiality to communications between counsel and lower-level officers and employees cannot be justified on that ground. Retention of the attorney-client privilege for such communications does not foreclose opposing parties from pursuing all conventional avenues of discovery made available under the federal rules, including questioning the same corporate personnel. *See, e.g.*, Note, *The Attorney and His Client's Privileges*, 74 Yale L.J. 539, 546-47 (1965). The attorney-client privilege appropriately fosters and protects the relationship between lawyer and client, but it does not bar discovery of the facts.

In summary, the question presented by petitioners concerning the proper scope of the attorney-client privilege is vitally important in terms of the legal profession and its responsibilities, and this question was wrongly decided by the court below. Review by this Court plainly is warranted.

2. *An attorney's work product should be accorded a qualified privilege against administrative discovery.* The court of appeals below held, without analysis or elaboration, that the work product doctrine does not apply to an administrative summons issued by the Internal Revenue Service. This holding, which has obvious implications for other forms of administrative discovery as well, squarely conflicts with the conclusion of the Seventh Circuit that "the work product doctrine does have applicability to a proceeding for the enforcement of an Internal Revenue summons." *United States* v. *Brown*, 478 F.2d 1038, 1041 (7th Cir. 1973). The resulting split of authority creates different rules for litigants in different jurisdictions and raises grave doubts about whether an attorney's work product on behalf of a corporation with geographically widespread activities can ever remain confidential.

There is no apparent basis or justification for the rejection of the work product doctrine in this case. This Court has expressly stated that evidentiary privileges may be asserted against a summons issued by the Internal Revenue Service. *Reisman* v. *Caplan*, 375 U.S. 440, 449 (1964). And it is well established that the applicability of the qualified privilege against disclosure of an attorney's work product is not limited, as the court below

apparently believed, solely to actions governed by the Federal Rules of Civil Procedure: the work product doctrine applies, for example, in both criminal cases and grand jury proceedings. *See, e.g., United States* v. *Nobles,* 422 U.S. 225, 238 (1975); *In re Grand Jury Subpoena,* 599 F.2d 504 (2d Cir. 1979); *In re Grand Jury Proceedings,* 473 F.2d 840, 842 (8th Cir. 1973).

The logic of the doctrine extends to administrative proceedings as well. This Court described the basis for the work product doctrine in *Hickman* v. *Taylor*:

> *Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.*
>
> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the

> legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 510-11 (emphasis added). These considerations and concerns are present whether the discovery sought is civil or administrative.

Assertion of the work product privilege in administrative proceedings would not foreclose or significantly curtail the government's ability to conduct a searching inquiry into the pertinent facts. The Internal Revenue Service, for example, has ample authority to secure information from the corporation, its employees, and others who may be in possession of records of transactions or actual knowledge of the facts. Moreover, the work product doctrine itself establishes only a qualified privilege that may be overcome by a showing of necessity. *See, e.g., Hickman* v. *Taylor,* 329 U.S. at 511-12; Fed. R. Civ. P. 26(b)(3). Thus, the government's legitimate interest in knowing the facts and reviewing the evidence can be given appropriate recognition within the traditional confines of the work product doctrine. See *United States* v. *Brown,* 478 F.2d at 1041. That interest does not require or justify wholesale rejection of the work product doctrine in administrative proceedings.

The novel decision below with respect to the work product doctrine serves to compound the harshness of the "control group" test that the court used to limit the attorney-client privilege. The two holdings together appear to permit the government to invade, without any showing of necessity, practically all records maintained by counsel concerning his confidential investigations into allegations of corporate wrongdoing. The consequence of thus turning corporate counsel into an interrogator for the government would be substantially to discourage the socially beneficial practice of corporate self-inquiry. Accordingly, this Court should grant certiorari in order to review both issues of privilege in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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